Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

BRIAN J. BENDER AND JAMES W. RAFFERTY,
PETITIONERS

v.

HECHT'S DEPARTMENT STORES, A DIVISION OF MAY ENTERPRISES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

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Dated: 2/13/05
NO. 3:04-0042
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

BRIAN J. BENDER and JAMES W. RAFFERTY

v.

HECHT'S DEPARTMENT STORES

MEMORANDUM

Pending before the Court are Defendant's Motion for Summary Judgment as to Brian Bender (Docket No. 31), Defendant's Motion for Summary Judgment as to James W. Rafferty (Docket No. 34), and Defendant's Motion to Sever (Docket No. 37).

For the reasons stated herein, Defendant's Motion for Summary Judgment as to Brian Bender (Docket No. 31) is GRANTED; Defendant's Motion for Summary Judgment as to James W. Rafferty (Docket No. 34) is GRANTED; and Defendant's Motion to Sever (Docket No. 37) is moot.

FACTS

Plaintiffs Brian J. Bender and James W. Rafferty have sued their former employer, May Department Stores d/b/a Hecht's Department Stores, alleging age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§621, et seq., ("AREA") and the Tennessee Human Rights Act, Tenn. Code Ann. §§ 4-21-401, et seq. ("the THRA").

Plaintiffs allege that they both were Divisional Sales Managers ("DSMs") for Defendant and over the age of forty when Defendant terminated their employment as part of a reduction in force in the company. Plaintiffs contend that they were the oldest two DSMs in the Nashville Hecht's market and that four other Nashville-area DSMs were given opportunities to stay with Defendant. Plaintiffs aver that in being terminated without being given the opportunity to move laterally, to take a demotion, or to otherwise remain with Hecht's, they were treated differently from similarly situated employees who were younger, in violation of Title VII and the THRA.

Defendant has moved for summary judgment as to both Plaintiffs, arguing that its decisions with regard to the reduction in force were legitimate, non-discriminatory, business decisions, having nothing to do with age. Defendant contends that Plaintiffs cannot show that this company-wide, nationwide reduction in force was in any way based upon age.

SUMMARY JUDGMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Meyers v. Columbia/HCA Healthcare Corp., 341 F.3d 461,466 (6th Cir. 2003). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. Id.; Hopsonv.

DaimlerChrysler Corp., 306 F.3d 427, 432 (6th Cir. 2002).

To prevail, the non-movant must produce specific evidence that demonstrates there is a genuine issue of material fact for trial. Meyers, 341 F.3d at 466. A mere scintilla of evidence is insufficient; there must be evidence on which the jury could reasonably find for the non-movant. Id. The non-moving party may not rest on mere allegations but must set forth specific facts showing that there is a genuine issue for trial. Hopson, 306 F.3d at 432.

AGE DISCRIMINATION

Under the ADEA, a plaintiff is typically required to proffer evidence of the following to make out a prima facie case of age discrimination: (1) that he was a member of a protected class (over the age of 40); (2) that he was subjected to an adverse employment action; (3) that he was qualified for the particular position; and (4) that he was replaced by a younger individual. Johnson v. Collins and Aikman Automotive Interiors, Inc., 2004 WL 1854171 at * 4 (E.D. Tenn. Feb. 26, 2004); Scott v. Good ear Tire & Rubber Co., 160 F.3d 1121, 1126 (6th Cir.1998).[1] In the context of a reduction in force, the fourth requirement is modified to require the plaintiff to offer some direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons. Id.; Skalka v. Ferbald Environmental Restoration Mgmt. Corp., 178 F.3d 414,420(6 th Cir.1999). Generally an ADEA plaintiff who has been terminated amidst a corporate reorganization carries a greater burden of supporting charges of discrimination than an employee who was

not terminated for similar reasons. Ridenour v. The Lawson Co., 791 F.2d 52, 57 (6th Cir. 1986).

The decision to retain younger persons in jobs for which the plaintiff was qualified does not satisfy the fourth prong of the prima facie case in a reduction in force situation. Johnson, 2004 WL 1854171 at * 4. When economic conditions force an employer to reduce its staff, the most common legitimate reason for a discharge is the reduction in force itself. Id. In such a situation, an employer's decision to discharge a qualified, older individual is not inherently suspicious because it is readily explainable that qualified employees are going to be discharged in the event of a reduction in force. Id. Moreover, the employer has no duty to transfer an employee to another position when the employer is in the process of a reduction of its workforce due to economic reasons. Id.

As with other employment discrimination cases, once a plaintiff establishes a prima facie case under the ADEA, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. Scott, 160 F.3d at 1126. If the defendant meets this burden, then the plaintiff is given an opportunity to prove, by a preponderance of the evidence, that the legitimate, nondiscriminatory reasons articulated by the defendant are a pretext for discrimination. Johnson, 2004 WL 1854171 at * 5. At all times, the burden remains on the plaintiff to prove that age was a determining factor in the adverse employment action taken against him. Id. at * 4.

The soundness of a employer's business judgment may not be questioned as a means of showing pretext. Johnson, 2004 WL 1854171 at * 6. An age discrimination action is not a means for permitting a jury to examine an employer's reasons for discharge

and determine that the employer's judgment or policies offend the jury's sensibilities. Id.

Here, Plaintiffs do not dispute that the position of DSM was eliminated in each store for which sales were less than $26 million and that their stores fell into that category. Plaintiffs contest the fact that they were not allowed to transfer within the company to other positions, while younger employees were given that opportunity. Plaintiffs argue that of the six DSMs in Nashville, the two oldest, who were also the two with the highest numbers on their most recent performance evaluations,[2] were terminated rather than being transferred within the company. The other four, ages 30, 39, 30 and 47, were allowed to stay employed in other positions with Defendant.

On the other hand, Defendant has shown that, company-wide,[3] 1450 employees lost their jobs, and Hecht's 81 stores lost a total of 35 DSMs. Defendant has also shown that, within Nashville's region (one of six regions for Hecht's stores), which includes thirteen stores, three DSMs were promoted, ages 50, 41 and 30; the youngest DSM was let go; and of the DSMs retained, seven were older than 40, including one aged 56. See Affidavit of Bruce Kelso, Senior Vice President for Human Resources, Exhibit 1 to Docket No. 36. [4]

Plaintiffs disagree with Defendant's explanations for choosing other DSMS for transfer rather than Plaintiffs. But, Plaintiffs bear the heavy burden of showing more than disagreement with the business decisions of Defendant. They must show that age was a motivating factor in the decisions not to offer them transfers within the company. This they have not shown. Both Plaintiffs have admitted that, during their employment, they never heard anyone at Hecht's make

age-related comments to them or to anyone else. Docket No. 47, Pars. 60 and 73.

In other words, even if Plaintiffs can establish their prima facie case, and even if Plaintiffs can create a genuine issue of material fact as to whether Defendant's legitimate, non-discriminatory reasons for its decisions were pretextual, they ultimately have not shown that the decisions concerning their employment were based upon their age.

For these reasons, Defendant's Motions for Summary Judgment (Docket No. 31 and 34) are GRANTED, and this action is DISMISSED.
IT IS SO ORDERED.

Footnotes

[1]The analysis of claims under the THRA is the same as is used under the ADEA. See, Johnson, 2004 WL 1854171 at * 3.

[2]Plaintiffs admit that performance evaluations are not the only evaluation process used by Defendant (Docket No. 47, Par. 20).

[3]Plaintiffs argue that job transitions outside the Nashville area are irrelevant to this action, but the Court disagrees. The "pool" of comparison employees in this company-wide reduction in force goes beyond the five stores in Nashville, particularly when the decisions concerning job placement were made by the Regional Vice President, the Senior Vice President of Stores and the Senior Vice President of Human Resources for the entire company. Docket No. 47, 99.

[4]The Court also notes that the three decision-makers concerning job promotions were 47, 51 and 54 years old. Docket No. 47, Par. 98.